No. 86-341

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

P. DANIEL COYNE, Director Bureau of Labor Standards, Department of Labor

Appellee

and

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

RAYMOND BOURGOIN, *et al.*

Appellees

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR APPELLANT

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32 pp

Questions Presented

1. Whether The Employee Retirement Income Security Act Of 1974, 29 U.S.C. § 1001 *Et Seq.*, Which Explicitly Supersedes "Any And All State Laws Insofar As They May . . . Relate To Any Employee Benefit Plan", Preempts A State Statute Requiring An Employer To Establish An Employee Severance Pay Plan With Benefits Either Determined By Contract Or By That Statute.

2. Whether The National Labor Relations Act, 29 U.S.C. § 141 *Et Seq.*, Preempts A State Statute That Discriminates Against Unionized Employers i) By Compelling Them To Reach An Agreement On A Mandatory Subject Of Bargaining (Severance Pay) Or Incur Specified Liability And ii) By Allowing Non-union Employers Unilaterally To Avoid The Specified Liability.

Parties to the Proceeding

The parties to the proceeding below were as follows:

Plaintiff-Appellees:

Director of Bureau of Labor Standards (State of Maine);
Raymond Bourgoin; Clarence Hachey; Reginald Pooler; Audrey Tyler; Dorothy Dyer; Debbie LaMontagne; Lawrence Belanger; Raymond Caouette; Alice Gurney; Bertha Knowles; Eugene Bourgoin

Defendant-Appellant:

Fort Halifax Packing Company[1]

Amicus Curiae:

Chamber of Commerce of the United States of America; Maine Chamber of Commerce and Industry

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[1]In accordance with Rule 28.1 of the Rules of this Court, Fort Halifax Packing Company, a Maine corporation, states that from June 24, 1986 to September 29, 1986 it was a wholly-owned subsidiary of Corbett Enterprises, Inc., a Delaware corporation with its executive offices in West Hartford, Connecticut ("Corbett Delaware"). From 1972 to June 24, 1986, Fort Halifax Packing Company was a wholly-owned subsidiary of Corbett Enterprises, Inc., a Missouri corporation ("Corbett Missouri"), whose executive offices were also in West Hartford, Connecticut. On June 24, 1986, in a statutory merger under the laws of Delaware and Missouri, Corbett Missouri was merged into Corbett Delaware, with the Delaware corporation as the surviving corporation. Corbett Poultry, Inc., a Delaware corporation, is also a wholly-owned subsidiary of Corbett Enterprises, Inc. On September 29, 1986, Hudson Foods, Inc., a Delaware corporation with a Rogers, Arkansas headquarters, purchased all of the outstanding and issued stock of Fort Halifax Packing Company's parent, Corbett Delaware.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constitution and Statutes:

Other Authorities:

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RAYMOND BOURGOIN, ET AL.,
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BRIEF FOR APPELLANT

Opinions Below

The opinion of the Maine Supreme Judicial Court, entitled *Director of Bureau of Labor Standards, et al.* v. *Fort Halifax Packing Company,* appellant's Jurisdictional Statement Appendix (hereinafter cited as "J.S. App.") A, is reported at 510 A.2d 1054 (Me. 1986). The opinions of the Maine Superior Court after trial and granting partial summary judgment, J.S. App. B and C respectively, are not reported.

Jurisdiction

The Maine Supreme Judicial Court entered judgment on June 2, 1986. The appellant filed a Notice of Appeal with the Clerk of the Maine Supreme Judicial Court and simultaneously filed a copy with the Clerk of the Maine Superior Court, Kennebec County, on August 4, 1986 (J.S. App. D). On August 29, 1986, the appellant docketed this appeal. On November 10, 1986, this Court noted probable jurisdiction. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved

Article VI, United States Constitution:

. . . The laws of the United States . . . shall be the supreme Law of the Land . . .

Statutes:

Section 625-B Title 26 of the Maine Revised Statutes Annotated and the relevant portions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, and of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, are reprinted in J.S. App. E.

Statement of the Case

From 1952 through 1981, Fort Halifax Packing Company ("Fort Halifax") and predecessor companies operated a poultry processing and packaging plant in Winslow, Maine. Corbett Enterprises, Inc., a multi-state poultry producer, acquired all of the assets of Fort Halifax in 1972. Almost all of Fort Halifax's approximately 125 employees were represented by Local 385 of the Amalgamated Meat Cutters & Butcher Workmen of North America. The union employees were covered by a

series of collective bargaining agreements and participated in the "Corbett Enterprises, Inc. Retirement Plan For Production Employees." Administrative and clerical employees not covered by the collective bargaining agreement participated in the "Corbett Enterprises, Inc. Retirement Plan for Sales, Administrative and Clerical Employees." Both plans uniformly covered employees in eleven states.

On May 21, 1981, because of adverse market conditions, Fort Halifax laid off most of its employees. Pursuant to the Retirement Plans, employees became eligible for immediate vesting and distribution of plan assets.

On October 30, 1981, eleven employees filed suit against Fort Halifax in Maine Superior Court seeking severance payments under 26 M.R.S.A. § 625-B (J.S. App. E). On November 2, 1981, the Director of the Bureau of Labor Standards of the Maine Department of Labor also commenced suit under 26 M.R.S.A. § 625-B. The latter action subsumed the individual plaintiffs' action. *See* 26 M.R.S.A. § 625-B(5).

Section 625-B requires certain employers that have shut down or relocated their operations to pay their former employees severance pay at the rate of one week's pay per year of employment unless: i) the relocation or termination results from natural calamity; ii) *the employee is covered by an express contract providing severance pay;* iii) the employee accepts employment at the relocation site; or, iv) the employee has been employed for less than three years.

Fort Halifax answered the complaints and asserted as defenses, *inter alia*, that the Maine statute was preempted by Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq*. *See* J.S. App. F at ¶24, A71 and ¶33, A77. The Maine Superior Court rejected Fort Halifax's federal preemption defenses and

entered judgment against it. (*See* J.S. App. C at A36, A42; J.S. App. B at A23, A26).

On appeal to the Maine Supreme Judicial Court, Fort Halifax argued, *inter alia*, that the Superior Court erred in holding that Section 625-B was not preempted by ERISA and the NLRA. In an opinion issued on June 2, 1986, the Supreme Judicial Court rejected these claims.

In considering Fort Halifax's claim that ERISA preempts the Maine severance pay statute, the Supreme Judicial Court explicitly recognized that ERISA Section 514(a) preempts any state law that "relates to" an employee benefit plan. *See* J.S. App. A at A6-A7. It also recognized that this Court has given the phrase "relate to" a "rather broad construction." *Id.* However, it held that Section 514 did not preempt Section 625-B on the theory that the severance pay liability thereunder was established by state law rather than by a private, voluntary employer plan. The Maine Supreme Judicial Court stated:

> In this case the severance pay liability created by Section 625-B is not a plan created by an employer or employee organization. Instead, it is a state created fringe benefit passed within the police power for the purpose of dealing with the economic dislocation that accompanies the shutdown of large establishments. Inasmuch as Section 625-B does not implicate a plan created by an employer or employee organization, it cannot be said to be preempted by ERISA.

Id. at A8.

The Supreme Judicial Court also rejected Fort Halifax's claim that Section 625-B interferes with the collective bargaining process and is preempted by the NLRA. The Court stated:

> Although Section 625-B does affect the collective bargaining relationship by encouraging employers to either agree to some form of severance pay contract or face liability under the act, it does not limit the rights of self-organization or forms of collective bargaining protected by the NLRA and is not preempted by the act.

Id. at A12.

On August 29, 1986, Fort Halifax docketed its appeal from the Maine Supreme Judicial Court, and on November 10, 1986, this Court noted probable jurisdiction.

Summary of Argument

Both the Employee Retirement Income Security Act ("ERISA") and the National Labor Relations Act ("NLRA") preempt the Maine statute.

ERISA. ERISA Section 514, 29 U.S.C. § 1144, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]". Severance pay is an employee benefit within ERISA's scope. *See, e.g., Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1146 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S. Ct. 3267 (1986); *Gilbert* v. *Burlington Industries*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986). The states may no more require employers to pay severance benefits than they could require them to pay pension benefits. Yet, that is what the Maine statute seeks to do. By mandating that employers maintain a severance pay plan providing benefits in accordance with the statutory formula or an express contract, Maine impinges on an area of exclusive federal concern.

ERISA not only preempts state laws requiring employee benefit plans, it preempts any state law having "a connection with or reference to" ERISA benefit plans. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97-98 (1983). The Maine statute bears

the necessary connection or relationship to ERISA benefit plans because statutory liability may be avoided only if the employer adopts a private plan. The relationship between the Maine statute and private plans could not be more direct.

Nothing in ERISA mandates that employers provide any particular benefit. *Shaw*, 463 U.S. at 91. Congress left that decision for private agreement. The Maine statute contravenes this intent by dictating that designated Maine employers make severance payments.

If the holding of the Maine Supreme Judicial Court is affirmed, states will be free to dictate any ERISA benefit. This result would undermine Congress's intent that the grant of such employee benefits be a matter of private choice within a framework of uniform and exclusive federal regulation.

NLRA. The Maine severance pay statute also interferes with free collective bargaining, which is the "cornerstone" of the NLRA. *Golden State Transit Corp.* v. *Los Angeles*, 106 S. Ct. 1395, 1401 (interim ed. 1986). Congress intentionally left certain aspects of the bargaining process " 'to be controlled by the free play of economic forces.' " *Golden State*, 106 S. Ct. at 1398 (quoting *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976)). The NLRA preempts state regulation of "conduct that Congress intended to be unregulated." *Golden State*, 106 S. Ct. at 1398 (quoting *Metropolitan Life Insurance Company* v. *Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380, 2394 (1985)).

Severance pay is a mandatory subject of bargaining under the NLRA, and as such the parties must negotiate severance pay issues in good faith. They are not, however, bound to agree on severance pay. *See* 29 U.S.C. § 158(d). In fact, an employer is free under federal law to refuse to provide severance pay or to unilaterally institute a severance pay plan at

whatever benefit level it has proposed prior to bargaining impasse. This is not the case, however, under the Maine statute. A union employer in Maine can avoid paying the statutory benefits only if the union agrees. Consequently, the statute enhances the union's collective bargaining power while depriving the employer of its federally protected self-help remedy to unilaterally implement its proposal after impasse. It is precisely in these circumstances, where states attempt to regulate "conduct that . . . remain[s] a part of the self-help remedies left to the combatants in labor disputes," that the NLRA preempts state laws. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 499 (1983).

The Maine severance pay statute is not saved from NLRA preemption as a minimum benefit statute or as one regulating an area such as insurance reserved to the states. *Cf. Metropolitan Life Insurance Company* v. *Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985). In *Metropolitan*, the minimum insurance benefit affected union and nonunion employers equally. In contrast, Maine permits an employer to provide less than the statutory severance benefit, or even no benefit at all according to the Maine Attorney General (Appellee's Motion to Dismiss or Affirm at 8 n.5); but the union employer may do so only with the union's agreement, while a nonunion employer is free to do so unilaterally.

If sustained, the Maine statute would be a roadmap for the states to augment a union's bargaining power on mandatory subjects of bargaining and restrict an employer's use of legitimate economic self-help remedies. This result would frustrate Congress's intent to allow the free play of economic forces to mold the substantive terms of collective bargaining agreements. The states may not intrude on the collective bargaining process by enforcing statutes that fail to provide a minimum benefit to all employees in their individual capacities. *Cf. Metropolitan* at 2398-99.

ARGUMENT

I. ERISA Preempts the Maine Severance Pay Statute.

A. Congress Sought to Occupy The Field of Employee Benefit Plans.

The Employee Retirement Income Security Act ("ERISA") preempts the Maine severance pay statute. Section 514 of ERISA, 29 U.S.C. § 1144, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." Section 514 has been referred to as the " 'most sweeping Federal preemption [provision] ever enacted by Congress.' " *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1146 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S. Ct. 3267 (1986), (citation omitted). It is a "virtually unique preemption provision." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). By enacting ERISA, Congress "aimed to occupy fully the field of employee benefit plans and to establish it 'as exclusively a federal concern.' " *Gilbert* v. *Burlington Industries*, 765 F.2d 320, 326 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986) (quoting) *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Congress's goal was to create uniformity in benefit laws and to prevent inconsistent or conflicting state regulation of employee benefit plans. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98-99 (1983); *Holland*, 772 F.2d at 1147.

In *Shaw* v. *Delta Air Lines, Inc.*, 465 U.S. 85, 98-100 (1983), this Court construed the reach of ERISA preemption broadly. In doing so, the Court relied on the legislative history to Section 514. Initially, the House and Senate each passed preemption provisions that were substantially narrower than Section 514(a); under these provisions a state law would have been preempted only if it related to subjects actually regulated by the federal statute. *See Shaw*, 463 U.S. at 98 n. 18. However, "[t]he Conference Committee rejected these provisions in favor of the present language, and indicated that the section's preemptive scope was as broad as its language." *Id.* (citing H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5162).

As recounted in *Shaw*, statements by the conferees during the subsequent debates stressed the breadth of federal preemption. *Id.* at 98-99. For example, Representative Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, explained:

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the *sole power* to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . .
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense *to foreclose any non-Federal regulation of employee benefits plans*. Thus, the provisions of Section 514 would reach any rule, regulation, practice or decision of any State . . . which would affect any employee benefit plan. . . .

120 Cong. Rec. 29197 (1974) (emphasis added). *See Shaw*, 463 U.S. at 99. Likewise, Senator Williams, Chairman of the Senate Committee of Labor and Public Welfare, stated:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefits plans. This principle is intended to apply in its broadest sense to all actions of State or local

governments, or any instrumentality thereof, which have the force or effect of law.

120 Cong. Rec. at 29933, *quoted in Shaw*, 463 U.S. at 99.

Thus, in enacting Section 514(a), Congress consciously decided to preempt not only "those state laws relating to subjects covered by ERISA", but also any "state laws relating to benefit plans". *Shaw*, 463 U.S. at 98 n.19. In doing so, the conferees flatly rejected the view that the preemption provisions of the House and Senate bills were "too broad" and instead expanded ERISA's preemptive reach. *Id.* at 98. Senator Javits stated that the conferees rejected both the House and Senate versions because of: i) the spectre of "endless litigation over the validity of State action that might impinge on Federal regulation" and ii) the fear of "multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." 120 Cong. Rec. 29942 (1974), *quoted in Shaw*, 463 U.S. at 99 n.20. Because of the "pervasive Federal interest" and the interest in national uniformity, Congress intended "the displacement of State action in the field of private employee benefit plans." *Id.*

Besides *Shaw*, the Court has addressed ERISA's preemption clause on two other occasions. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), the Court held that by enacting ERISA's broad preemption clause, Congress "meant to establish pension plan regulation as exclusively a federal concern." The Court emphasized that "even *indirect* state action bearing on private pensions may encroach upon the area of exclusive federal concern." 451 U.S. at 525 (emphasis added). The Court did note, however, that the scope of federal concern did not reach areas expressly preserved for state regulation, such as insurance, 451 U.S. at 522 n.19. Accordingly, in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985), while upholding a Massachusetts insurance statute, the Court reaffirmed the breadth and vitality of ERISA

preemption by stating Section 514 "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan*, 105 S. Ct. at 2389.

After *Alessi*, Congress on two occasions has reaffirmed the broad scope of ERISA preemption by making express and specific exceptions in situations deemed by it to be appropriate. Pub. L. 97-473 § 301(a), § 302(b); Pub. L. 98-397. Those amendments added specific exceptions from ERISA preemption for: i) the Hawaii Prepaid Health Care Act; ii) certain insurance standards applicable to multiple employer welfare benefit plans; and iii) qualified domestic relations orders. 29 U.S.C. § 1144(b)(5), (6) and (7). In enacting these amendments, Congress did not limit the expansive judicial construction accorded Section 514. *See, e.g.*, Statement of Representative Erlenborn, 128 Cong. Rec. H9,610 (daily ed. Dec. 13, 1982) ("In agreeing to the Hawaii exception [Congress] will be reaffirming the broad scope of ERISA preemption. . . ."). In the absence of any exception for state-mandated severance pay plans, Congress's intent not to permit state regulation of such plans is manifest.

This intent also may be seen in Congress's 1974 creation of the Joint Pension, Profit-Sharing and Employee Stock Ownership Plan Task Force of Congressional Committees to study and review "the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans." 29 U.S.C. § 1222(a)(5). This Task Force reaffirmed the need for national uniformity as being so great that "enforcement of state regulation should be precluded." *Shaw*, 463 U.S. at 99 n.20.

B. The Maine Severance Pay Statute Mandates An "Employee Benefit Plan."

ERISA defines an employee welfare benefit plan as including

> any plan, fund, or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment . . . or (B) any benefit described in section [302 (c) of the Labor Management Relations Act, 29 U.S.C. § 186(c)].

29 U.S.C. § 1002(1). Section 302(c)(6) of the LMRA includes "severance, or similar benefits" and thus places severance pay plans squarely within the definition of employee welfare benefit plans. *Holland* v. *Burlington Industries,* 772 F.2d 1140, 1144 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.,* 106 S.Ct. 3267 (1986); *Gilbert* v. *Burlington Industries, Inc.* 765 F.2d 320, 326 (2d Cir. 1985), *aff'd mem.,* 106 S. Ct. 3267 (1986). The Maine severance pay statute requires that an employer have a severance pay plan. While the employer has the option of i) accepting the statutory terms and conditions or ii) selecting other terms and conditions, either option results in a severance pay plan. *See* J.S. App. E.

For those employers that do not have or do not establish a "voluntary" plan, the Maine severance pay statute specifies the required terms and conditions. The statute: i) requires specified severance benefits to be paid; ii) creates former employees as the class of beneficiaries; iii) identifies the employer's general assets as the source of payment; and iv) establishes a procedure for collecting those benefits. Thus, the statute itself imposes an employee benefit plan upon employers. *See Donovan* v. *Dillingham,* 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*) (a plan exists under ERISA "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits"). *Accord Scott* v. *Gulf Oil Corp.,* 754 F.2d 1499, 1503-04 (9th Cir. 1985); *Molyneux* v. *Arthur Guinness & Sons,* 616 F. Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.,* 567 F. Supp. 1258, 1267 (N.D. Ala. 1983). Since the very operation of 26 M.R.S.A. § 625-B requires an employer to maintain a "plan", *a fortiori,* the statute "relates to" an employee benefit plan and is preempted by ERISA. ERISA § 514, 29 U.S.C. § 1144.

The Maine Supreme Judicial Court disclaimed ERISA preemption "[b]ecause Maine's severance pay statute is operative only when a privately created employee benefit plan covering severance pay is not in existence." *See* J.S. App. at A8. The Maine court presumed that there is no ERISA "plan" where employee benefits are mandated by state law. However, in *Standard Oil Co. of California* v. *Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981), this Court affirmed the Ninth Circuit's rejection of the same reasoning. There, the plaintiff challenged a state law requiring employers to provide a comprehensive prepaid health care plan to their employees. The State of Hawaii argued that federal preemption did not apply because the term "employee benefit plan" in Section 3 of ERISA, 29 U.S.C. § 1002, did not encompass plans mandated by state law. The Ninth Circuit rejected this argument, stating:

> We cannot agree . . . with Hawaii's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage. . . . There is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees. . . . The plans *envisioned* under the Hawaii statute are therefore not rendered outside the definition of employee welfare benefit plans *simply because Hawaii has attempted to make them mandatory.*

633 F.2d at 764 (citations omitted) (emphasis added). *Cf. Rebaldo* v. *Cuomo*, 749 F.2d 133, 138 (2d Cir.), *cert. denied*, 105 S. Ct. 2702 (1984) ("It is clear that ERISA preempts state laws that require or forbid the provision of a certain kind of benefit."). Although Congress eventually created a limited exception for the Hawaii Act, 29 U.S.C. § 1144(b)(5), it did not question the result reached by the courts. *See* Statement of Representative Erlenborn, 128 Cong. Rec. H9,610 (daily ed. December 13, 1982) (In enacting the Hawaii exception, Congress reaffirmed "the validity of the interpretation of the Federal courts in connection with the Hawaii statute.") (cited in *Council of Hawaii Hotels* v. *Agsalud*, 594 F. Supp. 449, 455 n.9 (D. Hawaii 1984)).

In *Agsalud*, Standard Oil had challenged the Hawaii statute because it would have imposed additional terms upon the company's existing health care plan. However, the court's ERISA preemption holding was not limited to conflicts between existing health plans and the statutory requirements. The Hawaii statute "envisioned" the establishment of new plans as well, and the court made clear that Hawaii could not require an employer to establish a new plan. 633 F.2d at 764. The Maine statute likewise "envisions" the establishment of severance pay plans, either according to the statutory formula or according to some other formula. Thus, the Maine Supreme Judicial Court's analysis cannot be reconciled with *Agsalud*, and it is *Agsalud* that finds support in the plain language of ERISA.

Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), exempts from ERISA's coverage a "plan . . . maintained solely for the purpose of complying with i) applicable workmen's compensation [laws] or ii) unemployment compensation [laws] or iii) disability insurance laws." These are the only exemptions for state-mandated employee benefits. If Congress had intended a sweeping exemption for all State-mandated employee benefits, Section 4(b)(3)'s specific exemptions for the three listed benefits would be superfluous. *See Pervel Industries, Inc.* v. *State of Connecticut Commission on Human Rights and Opportunities*, 468 F. Supp. 490, 492 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) (Congress need not "identify the several categories of state law it wishes to preempt"; only those laws expressly saved are exempt from ERISA preemption). As it did in *Metropolitan*, this Court should reject a construction that would render ERISA provisions "unnecessary" or "redundant". 105 S. Ct. at 2390. Instead, the Court may give effect to Section 4(b)(3) by holding, as in *Agsalud*, that the "plans envisioned under the [Maine] statute" are ERISA employee benefit plans. 633 F.2d at 764.

C. The Maine Severance Pay Statute Relates To Existing and Envisioned Employee Benefit Plans.

Section 514 preempts state laws that "relate to *any* employee benefit plan." (Emphasis added.) In *Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983), the Court construed the phrase "relate to" broadly, holding that "[a] law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 97-98. In arriving at this conclusion the Court quoted Black's Law Dictionary's definition:

> Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.

Id. at 97 n.16 (quoting Black's Law Dictionary 1158 (5th Ed. 1979)). In light of *Alessi*, *Shaw*, and *Metropolitan*, it is beyond dispute that ERISA preempts the Maine severance pay statute if that statute "relates to" employee benefit plans.

The Maine statute on its face relates to existing plans in at least two ways. First, the statute's applicability is measured directly against the existence of a private plan: only employers that have established their own severance pay formula

may avoid the statutory formula. Second, an employer with its own plan may not eliminate that plan without incurring liability under the statute.

Moreover, the Maine severance pay statute would be preempted under the "relate to" test even if no Maine employer had an existing severance pay plan. Because it "envisions" the creation of severance pay plans through private contract as an alternative to statutory liability, the statute relates to private plans that will be created to avoid statutory liability.

In sum, the Maine statute has an explicit and direct relationship with both established and envisioned ERISA plans. One could hardly posit a statute with a clearer "connection with or reference to" employee benefit plans.

D. The State of Maine May Not Require What Congress Left for Private Choice.

ERISA also preempts the Maine law because it mandates the provision of an ERISA benefit. Such mandated benefit statutes contravene Congress's intent that neither it nor the states should be involved in the business of dictating plan benefits.

In adopting ERISA Congress sought to avoid abuses in employee pension plans. It did so by enacting detailed provisions concerning pension vesting and funding, plan termination insurance, plan disclosure, fiduciary responsibility and portability of benefits. By these means, Congress sought to ensure that earned pension benefits would actually be realized. *See, e.g.*, 120 Cong. Rec. 29192 (1974) (remarks of Rep. Perkins); *id.* at 29944 (remarks of Sen. Javits). In enacting this "comprehensive and reticulated" statute (*Alessi*, 451 U.S. at 510), however, Congress did not require employers to maintain employee benefit plans, nor did it prescribe the type or level of benefits to be provided. The decision as to which employee benefit plans an employer would provide and their substantive content was

left completely to the private parties. In doing so, Congress was aware that benefits were often traded off against one another or against current compensation. *Cf.* H. R. Rep. No. 807, 93d Cong., 2d Sess. 48-49, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4714.

In *Alessi*, this Court recognized that employers are free *not* to provide ERISA-covered benefits, stating that "ERISA leaves this question largely to the private parties creating the plan." 451 U.S. at 511. In the Court's words, "the private parties, not the Government, control the level of benefits. . . ." *Id.* Similarly, in *Shaw* this Court stated that "ERISA does not mandate that employers provide any particular benefits." 463 U.S. at 91. *See also Moore* v. *Reynolds Metals Company Retirement Program for Salaried Employees*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) ("[A]n employer has no affirmative duty to provide employees with a pension plan. In enacting ERISA, Congress continued its reliance on *voluntary* action by employers.") (emphasis in original, citation omitted); *Sutton* v. *Weirton Steel Division of National Steel Corporation, et al.*, 567 F. Supp. 1184, 1195 (N.D. W. Va. 1983), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) ("ERISA does not require an employer to offer any type of benefit. . . .").

The State of Maine obviously disputes Congress's decision to leave the provision of benefits in the hands of private parties. Maine prefers a system that makes at least one of these benefits, severance pay, mandatory. However, Maine may not step into the severance pay area and mandate that which Congress left voluntary. Indeed, it defies logic to assume that Congress intended to prohibit the states from regulating employee benefit plans in any manner whatsoever but to allow them to require the payment of ERISA benefits.

II. The NLRA Preempts the Maine Severance Pay Statute.

The NLRA provides that the bargaining obligation "does not compel either party to agree to a proposal." *See* Section 8(d), 29 U.S.C. § 158(d). In construing Section 8(d), this Court has stated time and again over several decades that Congress intended employers and unions to negotiate in a generally unregulated atmosphere. *See, e.g., Golden State Transit,* 106 S. Ct. at 1400; *Machinists* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976); *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970); *Local 24 of the International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 293 (1959). This Court has elaborated:

> [T]he fundamental premise on which the act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Porter, 397 U.S. at 108. *See Teamsters,* 358 U.S. at 296 (States may not limit "the solutions that the parties' agreement can provide to the problems of wages and working conditions."). *Accord Golden State Transit,* 106 S. Ct. at 1401 ("Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations."); *Machinists,* 427 U.S. at 140, 148-151 (The parties' agreement should be controlled only by the "free play of economic forces."); *NLRB* v. *Insurance Agents International Union AFL-CIO,* 361 U.S. 477, 488 (1960) (Apart from their duty to bargain in good faith, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any government power to regulate the substantive solution of their differences."). Recently, this Court restated the NLRA limitation upon the police power of the states:

> The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

Metropolitan, 105 S. Ct. at 2395 (citations omitted).

Severance pay is a mandatory subject of bargaining. *See NLRB* v. *Royal Plating & Polishing Co.,* 350 F.2d 191 (3d Cir. 1965); C. Morris, The Developing Labor Law 773-74 (2d ed. 1983); *Advice Memoranda of NLRB General Counsel,* Case No. 25-CA-15237, June 30, 1983, *reprinted in* 113 LRRM (BNA) 1103, 1104. Accordingly, labor and management are bound to negotiate in good faith concerning severance pay issues. In the event that the parties are unable to agree, each party may use economic self-help to advance its bargaining position. *Machinists,* 427 U.S. at 146-47.

Normally, an employer's self-help remedies would include a lock-out, refusal to concede on issues in order to end a strike, temporary or permanent replacement of economic strikers, or institution of unilateral changes in terms and conditions of employment. *See, e.g., American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 313, 316 (1965). Resort to these measures "is part and parcel of the process of collective bargaining." *Machinists,* 427 U.S. at 149 (quoting *Insurance Agents,* 361 U.S. at 495). Allowing their "use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." *Machinists,* 427 U.S. at 146 (quoting *Teamsters* v. *Morton,* 377 U.S. 252, 258 (1964)). As restated in *Golden State,* states may not restrict these self-help remedies "unless such restrictions presumably were contemplated by Congress." 106 S. Ct. at 1399.

The Maine Supreme Judicial Court recognized that the Maine statute "affect[s] the collective bargaining relationship by encouraging employers to either agree to some form of severance pay contract or face liability under the act." J.S. App. A at A12. Nonetheless, it upheld the statute by relying on this Court's decision in *Metropolitan*. This reliance was misplaced.

Metropolitan involved a Massachusetts statue requiring *insurers* (not employers) to provide minimum mental-health care benefits in general insurance policies. As noted by this Court, the *Metropolitan* appellants did not even suggest that the statute operated to alter "the balance of power between the parties to the labor contract". 105 S. Ct. at 2395. Rather, the appellants attempted to expand NLRA preemption principles by arguing that Congress

> intended to prevent the States from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law.

Id. at 2395. This Court disagreed, stating that the NLRA is concerned with the "equitable process for determining terms and conditions of employment". *Id.* at 2396. The substantive terms themselves do not implicate NLRA preemption "when the parties are negotiating from relatively equal positions". *Id.*

Stressing the absence of conflict between federal labor policy aimed at maintaining "the equality of bargaining power" and a state statute imposing "*minimal substantive requirements*", this Court upheld the Massachusetts statute. *Id.* at 2397 (emphasis supplied). However, the Court made clear that its holding rested upon two critical criteria:

1. That the "minimum standards" neither encouraged nor discouraged the collective bargaining process; and,

2. That the "minimum standards" affected union and nonunion employees equally.

Unlike the statute in *Metropolitan*, the Maine statute intrudes on the bargaining *process*. In Maine, by the Supreme Judicial Court's holding, a union employer must agree on severance pay with the union or face liability under the statute. J.S. App. A at A12. Thus, the statute grants unions a bargaining chip and restricts an employer's use of economic self-help. The union's bargaining chip is either to hold out for more than the statutory severance benefit or, in lieu of all or part of that benefit, to bargain for other benefits. This bargaining chip is crucial because, on the other side of the Maine collective bargaining table, the employer is not free after impasse either to refuse to provide severance pay or to institute a plan providing less than the statutory benefit. This was not the case in *Metropolitan*, where this Court emphasized that employers retained the unilateral ability to avoid statutory liability by self-insuring or by not agreeing to provide insurance coverage. 105 S. Ct. at 2394. Union employers in Maine do not have similar options; they must agree with the union or pay benefits under the statute.

The Maine statute also fails the second *Metropolitan* criterion by not "affect[ing] union and nonunion employees equally." 105 S. Ct. at 2397. Because it does not establish a minimum benefit standard, the statute promotes inequality. The statutory severance benefit of one week's pay per year of service does not apply if there is an express contract providing severance pay at any level. Thus, an employer not subject to collective bargaining may unilaterally institute a severance pay plan with whatever benefit level it wishes to provide and thereby avoid the statutory liability. As discussed above, however, employers subject to collective bargaining cannot similarly avoid the reach of the statute. In *Metropolitan*, this Court stated:

> It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment

> that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S., at 202. It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who had chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Id. at 2398. Conversely, it does not further any purpose of the NLRA to saddle union employers with statutory obligations that other employers may avoid. The effect of the statute is to discriminate against workers who freely exercise their NLRA Section 7 "right to *refrain* from [union] activities." 29 U.S.C. § 157 (emphasis supplied).

The Maine Supreme Judicial Court also incorrectly characterized the Maine statute as a valid exercise of the state police power. The statute is inconsistent with the purposes of the NLRA and does not provide economic protection to all citizens. In *Metropolitan*, the Court found a valid exercise of the police power where the statute established generally applicable minimum employment standards not *inconsistent* with the purposes of the NLRA. 105 S. Ct. at 2398-99. State child labor, minimum wage, and health and safety laws, cited in *Metropolitan* as proof that Congress did not intend the NLRA to supplant all state mandated-benefits statutes (105 S. Ct. at 2398), differ from the Maine severance pay statute in two respects. First, they do not establish *optional* standards; they mandate uniform minimum standards that operate to protect all workers in their individual capacities. Maine boldly states that employers will not violate its statute even if they "eliminate severance pay entirely."Appellee's Motion to Dismiss or Affirm at 8 n.5. *Metropoltan*, with its emphasis on protection of the individual worker, does not authorize such a scheme. Second, as with insurance,

Congress has authorized the states to regulate child labor, minimum wages, and employee health and safety. *See* McCarran-Ferguson Act, 15 U.S.C. § 1101 *et seq.;* Fair Labor Standards Act, 29 U.S.C. § 201; Occupational Safety and Health Act, 29 U.S.C. § 667. There is no similar Congressional intent to preserve state regulation of severance benefits. Indeed, severance pay is a matter of exclusive federal concern. *Holland* and *Gilbert, supra.*

In sum, the Maine statute i) interferes with the bargaining process, ii) sets up a standard that nonunion employers can avoid easily and that unions can bargain away if they extract a satisfactory *quid pro quo*, and iii) interferes in an area in which the states retain little, if any, regulatory authority. Therefore, this Court's decisions in *Golden State* and *Metropolitan* dictate NLRA preemption.

CONCLUSION

For the foregoing reasons, the undersigned respectfully request that the judgment of the Maine Supreme Judicial Court be reversed.

Respectfully submitted,

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